No. 10,413

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARLEY VIRGLE TUDOR,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANT

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JURISDICTION

Jurisdiction is invoked under Section 311, Title 50, United States Code Annotated, said statute being set forth in the 1942 Cumulative Pocket Part to Title 50 of the United States Code Annotated, page 130 of said pocket part which provides in substance that any person who shall knowingly fail or neglect to perform any duty required of him under the provisions of the Selective Service and Training Act of 1940, or the rules and regulations and directions thereunder shall upon conviction in the District Court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000 or by both such fine and imprisonment.

INDICTMENT

United States of America
District of Arizona—ss.

Violation: 50 U. S. C. 311 Selective Training and Service Act.

In the District Court of the United States in and for the District of Arizona, at the November Term Thereof, A. D. 1942.

The Grand Jurors of the United States of America, impaneled, sworn and charged, on their oath aforesaid, of the Court aforesaid, on their oath present that on the 8th day of May, 1942, at Glendale, Arizona, and within the jurisdiction of this Court, Arley Virgle Tudor, whose full and true name other than as given herein is to the Grand Jurors unknown, being then and there a person liable for training and service under the Selective Training and Service Act of 1940, and the amendments thereto, and having theretofore registered under said Act, knowingly, wilfully, unlawfully, and feloniously did fail and neglect to perform a duty required of him under and in the execution of said Act and the Rules and Regulations duly made pursuant thereto, in this, that the said Arley Virgle Tudor, having been classified in Class 1-A by his local Board, being Maricopa County Local Board No. 6, created and located in Maricopa County, Arizona, under and by virtue of the provisions of the Selective Training and Service Act of 1940, as amended, and the Rules and Regulations issued thereunder, and said defendant having been notified by said board to report at Glendale, Arizona, on May 8, 1942, for induction into the land or naval forces of the United States, the action of said local board, as aforesaid, being pursuant to the power conferred upon said board

by the Selective Training and Service Act of 1940, and the amendments thereto, and the Rules and Regulations duly made pursuant thereto, did, knowingly, wilfully, unlawfully, and feloniously fail and neglect to report for induction, as aforesaid, as he was required to do by the notice and order of said board; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

F. E. FLYNN
United States Attorney

(Endorsed): Indictment A true bill, Sam W. Seaney Foreman.

(Endorsed): Filed Jan. 28, 1943. (T. R. 2-3)

PLEA OF NOT GUILTY

The appellant, Arley Virgle Tudor, entered a plea of not guilty upon his arraignment.

TRIAL

The cause herein came on regularly for trial in the Distirct Court of Arizona before the Honorable Dave W. Ling presiding with a jury on the 8th day of April, 1943, at Phoenix, Arizona.

STATEMENT

The appellant, Arley Virgle Tudor, is a member of Jehovah's Witnesses, a Christian Society engaged in the teaching and preaching of the Bible, and he is opposed to war. The said appellant, Arley Virgle Tudor, registered under the Selective Service Act of 1940, being title 50 of the United States Code, Chapter 301-311 inclusive, on November 19, 1940, and classified in class III-A. (T. R. 25, 26) Thereafter on September 30, 1941 he was re-classified in Class 1-H, which at that time was a deferred classification given to all

men in Class 1 over the age of 28. (T. R. 26-27). Later, and on or about February 13, 1942, the appellant was, as near as can be ascertained, classified in Class 1-A. (R. T.-P. 27-lines 10 to 16) (See Government's Exhibit 9 in Evidence.) The appellant's questionnaire was never notarized nor sworn to as provided under the Selective Service Rules and Regulations. (T. R. 25) In the questionnaire the appellant stated that he was a conscientious objector (T. R. 25) which claim was ignored entirely by the Glendale, Arizona local Selective Service board. Appellant was also supporting and had as dependents upon him, his mother, Ella Tudor, and his son, Roy L. Tudor (T. R. 24) (T. R. 46-47) and as such was entitled to classification III-A, under Selective Service Rules and Regulations—(Selective Service and Training Act of 1940 (Section 5(e)—Section 622.32).

The Maricopa County, Arizona Local Selective Service Board No. 6 at Glendale, Arizona ordered appellant to report for induction into the army on May 8th, 1942. Appellant did not appear for induction and was thereafter indicted and tried for failure to obey orders of Local Selective Service Board No. 6, Glendale, Maricopa County, Arizona and found guilty. This appeal follows conviction upon the charge as laid in the indictment.

SPECIFICATIONS OF ERROR

Specification of Error No. I.

That on the 17th day of February, 1943, the defendant moved to quash the indictment upon the grounds and for the reasons that said information does not state facts sufficient to constitute a crime or offense and that the indictment failed to state that the Glendale, Arizona local selective service board acted in ac-

cordance with the rules and regulations of the selective service system or that the defendant was subject to the orders made by the Glendale, Arizona local selective service board. That the Honorable Court erred in denying said motion to quash which order was entered on the 17th day of February, 1943. (T. R. 50)

Specification of Error No. II.

That the Honorable Court erred in admitting to evidence the Government's Exhibit No. 2 in evidence for the reason that said exhibit was a Selective Service Questionnaire that had not been executed in accordance with the rules of the Selective Service System in that it had not been sworn to as provided by said rules. (T. R. 50-51)

Specification of Error No. III.

That the Honorable Court erred in permitting testimony by Thomas Riordan as to what the Rules and Regulations of the Selective Service System were. (See pages 10, 11, 12, 13 of Reporter's Transcript). That such testimony could not be regarded as the best evidence and was not admissible. (T. R. 51)

Specification of Error No. IV.

That the Honorable Court erred in instructing the jury that even if a local Draft Board acted in an arbitrary and capricious manner, or denies a registrant a full and fair hearing nevertheless the registrant must comply with the Board's orders and then defend his dereliction by collaterally attacking the Board's administrative acts. It is the contention of the defendant that the Court is not bound to convict and punish one for disobedience of an unlawful order by whomsoever

made. The defendant herein was proved to be a man with dependants which would, under the Selective Service Rules and Regulations, place him in a deferred class as 3-A. The questionnaire and evidence definitely show that the said defendant was a conscientious objector and could, under no rule of the Selective Service System be properly classed in class 1-A and inducted into military service. For the above reasons the orders of the Glendale, Arizona Selective Service Board, Maricopa County Local Board No. 6 were unlawful and the Circuit Court of Appeals for the Ninth District has held that, "It is no violation of Section 311 of the Act to fail to obey an order which the Board had no power to make." (T. R. 51-52)

ARGUMENT

Assignment of Error No. I.

That on the 17th day of February, 1943, the defendant moved to quash the indictment upon the grounds and for the reasons that said information does not state facts sufficient to constitute a crime or offense and that the indictment failed to state that the action of the Glendale, Ariona local selective service board acted in accordance with the rules and regulations of the selective service system or that the defendant was subject to the orders made by the Glendale, Arizona local selective service board. That the Honorable Court erred in denying said motion to quash, which order was entered on the 17th day of February, 1943. (T. R. 50)

Every fact necessary to constitute the crime charged must be directly and positively alleged and nothing can be charged by implication or intendment.

Omission from the indictment of any fact or circumstance necessary to constitute an offense will be fatal.

U. S. vs. Cruikshank. 92 U. S. 542;

U. S. vs. Britton, 107 U. S. 655;
Harris vs. U. S., 104 Fed. (2nd) 41;
Kane vs. U. S., 120 Fed. (2nd) 990;
Pettibone vs. U. S., 148 U. S. 197.

Assignment of Error No. II.

That the Honorable Court erred in admitting to evidence the Government's Exhibit No. 2 in evidence for the reason that said exhibit was a Selective Service Questionnaire that had not been executed in accordance with the rules of the Selective Service System in that it had not been sworn to as provided by said rules. (T. R. 50-51)

Selective Training and Service Act of 1940 provides (section 605.1 (c) that every registrant must make the registrant's affidavit. If the registrant cannot read, the questions and answers thereto shall be read to him by the officer who administers the oath; and if he cannot write, his "X mark" signature must be witnessed by the same officer. None of the printed matter of the affidavit may be added to or erased or sticken out, except the word "swear" or "affirm" as the case may be.

Here the Glendale Local Selective Service Board violated the Selective Service law by failing to follow the rules and regulations set forth therein and made an order thereunder directing the appellant to appear for induction. It is the contention of the Appellant that the failure of the board to follow the Selective Service law made a subsequent order invalid, and it is the further contention of the appellant that he can not be criminally liable for failure to comply with the invalid order of the Selective Service Board. The order of induction made by the draft board after failure to observe the rules and regulations of the Selective Service law and after failure to give any consideration

or hearing whatsoever to the contention of the appellant that he was a conscientious objector not only invalided the said order, but such action was obviously arbitrary and it has been held in the case of United States vs. Johnson, 126 Fed. 2d 242 as follows: "the courts can prevent arbitrary action by administrative agencies, created by or under authority of Congress, in classifying registrants under Selective Service Act, from becoming effective, as in case of classification contrary to all substantial evidence, but a registrant cannot come to court for relief until he has exhausted all available and sufficient administrative remedies." We cannot see where there were any administrative remedies open to appellant to discover or correct the procedure of the board until after the time of his indictment. It is also the contention of the appellant that in practically all cases dealing with an administrative board's decisions or acts made arbitrarly or capriciously without evidence or contrary to evidence may be inquired into by the Federal courts and where necessary such decisions or acts may be set aside.

Angellus vs. Sullivan, 246 Fed. 54 (CCA 2d);
Boitano vs. District Board, 250 Fed. 812;
United States vs. Kinkead, 250 Fed. 692 (CCA 3d);
Ex parte Fuston, 250 Fed. 90;
St. Joseph Stock Yards vs. U. S., 298 U. S. 38, 52, 53, 74, 75.

Assignment of Error No. III.

That the Honorable Court erred in permitting testimony by Thomas Riordan as to what the Rules and Regulations of the Selective Service System were. (See pages 10, 11, 12, 13 of Reporter's Transcript). That such testimony could not be regarded as the best evidence and was not admissable. (T. R. 51)

It is the contention of the appellant that the Rules and Regulations of the Selective Service System are the best evidence as to the provisions of said Rules and Regulations and that there was no reason assigned by the government for failure to produce the Rules and Regulations themselves or has a reason for introducing secondary evidence as to what said rules contained. Rules of evidence as to what is the best evidence are so fundamental that it is unnecessary to set forth any further argument.

Assignment of Error No. IV.

That the Honorable Court erred in instructing the jury that even if a Local Draft Board acted in an arbitrary and capricious manner, or denies a registrant a full and fair hearing nevertheless the registrant must comply with the Board's orders and then defend his dereliction by collaterally attacking the Board's administrative acts. It is the contention of the defendant that the Court is not bound to convict and punish one for disobedience of an unlawful order by whomsoever made. The defendant herein was proved to be a man with dependants which would, under the Selective Service Rules and Regulations, place him in a deferred class as 3-A. The questionnaire and evidence definitely show that the said defendant was a conscientious objector and could, under no rule of the Selective Service System be properly classed in class 1-A and inducted into military service. For the above reasons the orders of the Glendale, Arizona Selective Service Board, Maricopa County Local Board No. 6 were unlawful and the Circuit Court of Appeals for the Ninth District has held that, "It is no violation of Section 311 of the Act to fail to obey an order which the Board had no power to make." (T. R. 51-52).

The Transcript of Record clearly shows that the appellant herein had dependants whom he was supporting at the time he was re-classified into class 1-H and at the time he was again re-classified into class 1-A, and the order for induction was made. The Transcript of

Record shows this clearly on pages 46 and 47 thereof under the testimony of Ella Tudor:

Ella Tudor was called as a witness on behalf of defendent, and being first duly sworn, testified as follows:

Mr. Chester:

Q. Will you state your name?
A. My name is Ella Tudor.

Q. What relation are you to the defendant?
A. I am his mother.

Q. And do you live with the defendant?
A. Not since the law has been dragging him around. Until then I did.

Q. But until that time you did?
A. Yes, sir.

Q. Did you work? A. Me?

Q. Yes.
A. We both worked. We are supposed to work.

Q. What work did you have?
A. I did housework. I worked for him, kept house.

Q. Kept house for him? A. Yes.

Q. And was there any others in the family?
A. His son—my grandson.

Q. How old is he? A. Thirteen.

Q. Does he live with you and Mr. Tudor?
A. He lives with me and his father.

Q. Up until the time he was brought back from Illinois? A. Until he was arrested.

Q. The son does not work, does he?
A. Sir?

Q. The son does not work, does he, the boy does he work? A. The little boy?

Q. Yes.

A. Well, he goes to school.

Q. Is he living with Mr. Tudor now?

A. No, he isn't with us now. I brought him back here and sent him to his mother when they put him in jail. What could we do then? They broke up our home. We couldn't keep house and him in jail and us somewhere else.

Testimony of the defendant which was uncontroverted showed that he had dependents being his mother and his son. (T. R. 46)

The Selective Service Board cannot bind a registrant by an arbitrary classification against all of the substantial information before it as to his proper classification. Classifications by such agency must, under the powers given it by Congress be honestly made, and a classification made in the teeth of all substantial evidence before such agency is not honest but arbitrary.

Under recross examination, Mr. Riordan, secretary of Local Selective Service System Board, Glendale, Arizona, testifies definitely that there was no evidence showing that appellant was no conscientious objector. His testimony further showed that there was no hearing as to this matter nor was there any evidence to disapprove appellant's claim that he should be classified as a conscientious objector. See Reporter's Transcript, pages 39 to 41 inclusive:

Recross Examination

MR. CHESTER:

Q. Mr. Riordan, of course that matter—what matters came up regarding the classification as a conscientious objector?

A. Well, he had a notation in there that he was a conscientious objector in one part of the questionnaire, and in another part of the questionnaire he had a mark with an "X" that he was opposed to both combatant and non-combatant service, and the Board felt that he was not a conscientious objector; that is, they didn't think—they felt he should be put in Class 1-A, and with the idea that if he was a conscientious objector and did not like their ruling that he had the right of appeal, but in their opinion they felt he was not a conscientious objector.

Q. Was there any testimony offered as to the reason why he should not be classified as a conscientious objector; anything to show that his request of his application as a conscientious objector was wrong or that he was not telling the truth about that?

MR. WALSH: I object to that, your Honor, as immaterial.

THE COURT: Well, we should find out what they did. Maybe they just sat back and said, "He is not." I could have said the same thing. What do I know about it? It had to be based on something.

MR. WALSH: The Board is under no requirement to take evidence. As a matter of fact, the Regulations provide they shall pass on nothing except what is in the file.

THE COURT: The question is whether he had a hearing, and not the sufficiency of the evidence. I

can't review that, but if he had no hearing, why, I certainly could review that.

MR. CHESTER: Q. Now, upon what matters was this decision based?

A. Well, they felt—they said, "Well, the fact he says, 'I am a conscientious objector' with nothing else to substantiate it", they felt that that was not sufficient, and they would classify him 1-A. The fact he said, "I am a conscientious objector," why, they felt that that was not enough evidence to prove to them that he was a conscientious objector, knowing he had the right of appeal in the event he was put in Class 1-A. They discussed that. That if he is a conscientious objector and he is not satisfied with his classification, then he has the right of appeal to the Board of Appeals.

Q. Did the Board send him a conscientious objector's form?

A. No, sir.

Q. You have nothing before you to show the exact status of this man's conscience then as to what his objections were to combat service?

A. No, no other than his statement.

MR. CHESTER: That is all.

MR. WALSH: Q. You did have everything that he had ever filed with the Board?

A. Yes; everything that he had written or filed was in his cover sheet at the time.

MR. WALSH: That is all.

The instruction as given by the court was contrary to law.

U. S. vs. Johnson, 126 Fed. (2nd) 242;
Angellus vs. Sullivan, 246 Fed. 54;
Ex Parte Stewart, 49 Fed. Supp 410;
Ex Parte Stewart, 47 Fed. Supp. 410;
Boitano vs. District Board, 250 Fed. 812;
U. S. vs. Kinkead, 250 Fed. 692;
St. Joseph Stockyards vs. U. S., 298 U. S. 38.

It follows that the Court should have directed the verdict and left the defendant where it found him subject under the law to the further orders of his local board.

It is respectfully submitted that the Judgment of the District Court should be reversed.

Dated, Phoenix, Arizona,

August 26, 1943.

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